

Howard Rome Martin & Ridley LLP

1900 O'Farrell Street, Suite 280
San Mateo, CA 94403
Telephone (650) 365-7715

1 **TODD H. MASTER [SBN. 185881]**
tmaster@hrmrlaw.com
2 **HOWARD ROME MARTIN & RIDLEY LLP**
3 1900 O'Farrell Street, Suite 280
4 San Mateo, CA 94403
Telephone: (650) 365-7715
Facsimile: (650) 364-5297
5 Attorneys for Defendants
CITY OF MENLO PARK and
6 DAVE BERTINI
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

MICHAEL ZELENY, an individual

Case No. 17-cv-07357-RS

Plaintiff,

**ANSWER OF DEFENDANTS CITY OF
MENLO PARK AND DAVE BERTINI TO
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

vs.

EDMUND G. BROWN, JR., an individual, in
his official capacity, et al.

Defendants.

COME NOW Defendants CITY OF MENLO PARK and DAVE BERTINI (collectively,

“Answering Defendants” or “Menlo Park Defendants”) and in answer to Plaintiff’s Complaint on
file herein admit, deny and allege as follows:

INTRODUCTION

1. Answering Defendants deny the allegations contained in Paragraph 1 of the
Complaint.

1 2. Answering the allegations contained in Paragraphs 2, 3 and 4 of the Complaint,
2 Answering Defendants allege that they are without sufficient information or belief to enable them
3 to answer the allegations of this paragraph and, basing their denial on that ground, deny the
4 allegations therein.

5 3. Answering the allegations contained in Paragraph 5 of the Complaint, Answering
6 Defendants deny that they were enlisted by anyone to suppress plaintiff's speech. Answering
7 Defendants allege that they are without sufficient information or belief to enable them to answer
8 the remaining allegations of this paragraph and, basing their denial on that ground, deny the
9 remaining allegations therein.

10 4. Answering the allegations contained in Paragraph 6 of the Complaint, Answering
11 Defendants admit that the CITY OF MENLO PARK requires any and all persons wishing to film a
12 motion picture, television program, other video production, or entertainment event within the
13 public right-of-way to apply for and obtain a film permit from the CITY OF MENLO PARK.
14 Answering Defendants deny the remaining allegations in this Paragraph.

15 5. Answering the allegations contained in Paragraph 7 of the Complaint, Answering
16 Defendants deny that they have violated or threatened to violate plaintiff's rights under the First,
17 Second, and Fourteenth Amendments to the United States Constitution and provisions of the
18 California State Constitution. Answering Defendants deny any allegation that Answering
19 Defendants have unconstitutionally applied California statutes against plaintiff. Answering
20 Defendants allege that they are without sufficient information or belief to enable them to answer
21 the remaining allegations of this paragraph and, basing their denial on that ground, deny the
22 remaining allegations therein.

23 6. Answering the allegations contained in Paragraph 8 of the Complaint, Answering
24 Defendants deny any allegation that they have unlawfully interpreted the California Penal Code as
25 applied to plaintiff. Answering Defendants deny that the CITY OF MENLO PARK's adoption and
26 enforcement of municipal policy is a content-based restriction on plaintiff's protected speech.

1 Answering Defendants allege that they are without sufficient information or belief to enable them
2 to answer the remaining allegations of this paragraph and, basing their denial on that ground, deny
3 the remaining allegations therein.

4 **JURISDICTION AND VENUE**

5 7. Answering the allegations contained in Paragraph 9 of the Complaint, Answering
6 Defendants allege that they are without sufficient information or belief to enable them to answer
7 the allegations of this paragraph and, basing their denial on that ground, deny the allegations
8 therein.

9 8. Answering Defendants admit the allegations contained in Paragraph 10 of the
10 Complaint.

11 9. Answering the allegations contained in Paragraphs 11 and 12 of the Complaint,
12 Answering Defendants admit the content of the referenced code sections, but deny that plaintiff is
13 entitled to the declaratory and injunctive relief he seeks herein as against Answering Defendants.

14 10. Answering the allegations contained in Paragraph 13 of the Complaint, Answering
15 Defendants admit the content of the referenced code section.

16 11. Answering the allegations contained in Paragraph 14 of the Complaint, Answering
17 Defendants admit the content of the referenced code sections.

18 12. Answering the allegations contained in Paragraph 15 of the Complaint, Answering
19 Defendants deny that they committed any unlawful acts. Answering Defendants admit that their
20 lawful actions occurred in the State of California and within the Northern District of California.
21 Answering Defendants allege that they are without sufficient information or belief to enable them
22 to answer the remaining allegations of this paragraph and, basing their denial on that ground, deny
23 the remaining allegations therein.

24 13. Answering Defendants admit the allegations in Paragraph 16 of the Complaint.

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THE PARTIES

2 14. Answering the allegations contained in Paragraphs 17, 18 and 19 of the Complaint,
 3 Answering Defendants allege that they are without sufficient information or belief to enable them
 4 to answer the allegations of this paragraph and, basing their denial on that ground, deny the
 5 allegations therein.

6 15. Answering Defendants admit the allegations contained in Paragraph 20 of the
 7 Complaint.

8 16. Answering the allegations contained in Paragraph 21 of the Complaint, Answering
 9 Defendants admit that Dave Bertini is the Interim Police Chief and that he acted in his official
 10 capacity as a member of the Menlo Park Police Department during the general time periods
 11 referenced in the Complaint. Answering Defendants admit that Dave Bertini is a citizen and
 12 resident of the State of California and the Northern District of California. Answering Defendants
 13 deny the remaining allegations of this Paragraph.

14 17. Answering the allegations contained in Paragraph 22 of the Complaint, Answering
 15 Defendants deny the unlawful acts and omissions alleged in the Complaint, but admit that
 16 Answering Defendants acted lawfully under color of state law. Answering Defendants allege that
 17 they are without sufficient information or belief to enable them to answer the remaining allegations
 18 of this paragraph and, basing their denial on that ground, deny the remaining allegations therein.

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FACTS**Min Zhu's Heinous Conduct**

21 18. Answering the allegations contained in Paragraphs 23 through 26 of the Complaint,
 22 Answering Defendants allege that they are without sufficient information or belief to enable them
 23 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 24 allegations therein.

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1 **Zeleny Becomes Aware of Min Zhu's Conduct**

2 19. Answering the allegations contained in Paragraphs 27 through 30 of the Complaint,
 3 Answering Defendants allege that they are without sufficient information or belief to enable them
 4 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 5 allegations therein.

6 **NEA's Support of Min Zhu Despite Knowledge of the Allegations of His Conduct**

7 20. Answering the allegations contained in Paragraphs 31 through 38 of the Complaint,
 8 Answering Defendants allege that they are without sufficient information or belief to enable them
 9 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 10 allegations therein.

11 **Zeleny's Protests Against Min Zhu and His Enablers**

12 21. Answering the allegations contained in Paragraphs 39 through 44 of the Complaint,
 13 Answering Defendants allege that they are without sufficient information or belief to enable them
 14 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 15 allegations therein.

16 22. Answering the allegations contained in Paragraph 45 of the Complaint, Answering
 17 Defendants admit that on some occasions plaintiff notified the MENLO PARK Police Department
 18 in advance of demonstrations and that, when asked, plaintiff complied with inspections of his
 19 weapons to confirm they were not loaded. Answering Defendants allege that they are without
 20 sufficient information or belief to enable them to answer the remaining allegations of this
 21 paragraph and, basing their denial on that ground, deny the remaining allegations therein.

22 23. Answering the allegations contained in Paragraph 46 of the Complaint, Answering
 23 Defendants allege that they are without sufficient information or belief to enable them to answer
 24 the allegations of this paragraph and, basing their denial on that ground, deny the allegations
 25 therein.

1 **The Attempts to Stifle Zeleny's Protests**

2 24. Answering the allegations contained in Paragraphs 47 through 56 of the Complaint,
 3 Answering Defendants allege that they are without sufficient information or belief to enable them
 4 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 5 allegations therein.

6 **Participation of Law Enforcement in the Attempts to Stifle Zeleny's Protests**

7 25. Answering Defendants admit the allegations contained in Paragraph 57 of the
 8 Complaint.

9 26. Answering the allegations contained in Paragraph 58 of the Complaint, Answering
 10 Defendants admit that plaintiff was restricted from entering onto, or blocking access, to private
 11 property without the approval of the private property owner and that the MENLO PARK Police
 12 Department enforced California law. Answering Defendants deny the remaining allegations in
 13 this paragraph.

14 27. Answering the allegations contained in Paragraphs 59 through 63 of the Complaint,
 15 Answering Defendants allege that they are without sufficient information or belief to enable them
 16 to answer the allegations of these paragraphs and, basing their denial on that ground, deny the
 17 allegations therein.

18 **California Adopts "Open Carry" Restrictions for handguns and Non-handgun Firearms**

19 28. Answering the allegations contained in Paragraph 64 of the Complaint, Answering
 20 Defendants allege that they are without sufficient information or belief to enable them to answer
 21 the allegations of this paragraph and, basing their denial on that ground, deny the allegations
 22 therein.

23 29. Answering the allegations contained in Paragraph 65 of the Complaint, Answering
 24 Defendants admit that California Penal Code section 26350 prohibits persons from openly carrying
 25 an unloaded handgun outside of a vehicle in a public place or public street in an unincorporated
 26 city or city and county.

1 30. Answering the allegations contained in Paragraph 66 of the Complaint, Answering
 2 Defendants admit that California Penal Code section 26375 provides that California Penal Code
 3 section 26350 “does not apply to, or affect, the open carrying of an unloaded handgun by an
 4 authorized participant in, or an authorized employee or agent of a supplier of firearms for, a motion
 5 picture, television or video production, or entertainment event, when the participant lawfully uses
 6 the handgun as part of that production or event, as part of rehearsing or practicing for participation
 7 in that production or event, or while the participant or authorized employee or agent is at that
 8 production or event, or rehearsal or practice for that production or event.”

9 31. Answering the allegations contained in Paragraph 67 of the Complaint, Answering
 10 Defendants admit that California Penal Code section 26400 provides that a “person is guilty of
 11 carrying an unloaded firearm that is not a handgun when that person carries upon his or her person
 12 an unloaded firearm that is not a handgun outside a vehicle” while in an “incorporated city or city
 13 and county, or in a public place or a public street in a prohibited area of an unincorporated area of a
 14 county.” Answering Defendants allege that they are without sufficient information or belief to
 15 enable them to answer the remaining allegations of this paragraph and, basing their denial on that
 16 ground, deny the remaining allegations therein.

17 32. Answering the allegations contained in Paragraph 68 of the Complaint, Answering
 18 Defendants admit that California Penal Code section 26405(r) provides that California Penal Code
 19 section 26400 does not apply to, or affect, the carrying of an unloaded firearm that is not a handgun
 20 “by an authorized participant in … a motion picture, television, or video production or
 21 entertainment event, when the participant lawfully uses that firearm as part of that production or
 22 event, as part of rehearsing or practicing for participation in that production or event, or while the
 23 participant or authorized employee or agent is at that production or event, or rehearsal or practice
 24 for that production or event.”

25 33. Answering the allegations contained in Paragraph 69 of the Complaint, Answering
 26 Defendants admit that California Penal Code section 25510 provides that California Penal Code

1 section 25400 does not apply to the “possession of a firearm by an authorized participant in a
 2 motion picture, television, or video production, or an entertainment event, when the participant
 3 lawfully uses the firearm as part of that production or event, or while going directly to, or coming
 4 directly from, that production of event.”

5 **Zeleny's Efforts to Engage in Protected First and Second Amendment Activity**

6 34. Answering the allegations contained in Paragraphs 70 through 76 of the Complaint,
 7 Answering Defendants allege that they are without sufficient information or belief to enable them
 8 to answer the allegations of this paragraph and, basing their denial on that ground, deny the
 9 allegations therein.

10 35. Answering Defendants deny the allegations contained in Paragraph 77 of the
 11 Complaint.

12 **The City Threatens Further Prosecution in an Effort to Chill Zeleny's Protected Speech**

13 36. Answering Defendants deny the allegations contained in Paragraph 78 of the
 14 Complaint.

15 37. Answering Defendants deny the allegations contained in Paragraph 79 of the
 16 Complaint.

17 38. Answering the allegations contained in Paragraph 80 of the Complaint, Answering
 18 Defendants admit that the CITY OF MENLO PARK requires any and all persons, including
 19 plaintiff, wishing to film a motion picture, television program, or other video production within the
 20 public right-of-way to apply for and obtain a film permit from the CITY OF MENLO PARK.
 21 Answering Defendants deny the remaining allegations of this Paragraph.

22 39. Answering Defendants deny the allegations contained in Paragraphs 81 and 82 of
 23 the Complaint.

24 40. Answering the allegations contained in Paragraph 83 of the Complaint, Answering
 25 Defendants admit that plaintiff applied for a single Special Event permit, which was denied.
 26 Answering Defendants deny the remaining allegations of this Paragraph.

41. Answering Defendants deny the allegations contained in Paragraphs 84 through 86 of the Complaint.

42. Answering the allegations contained in Paragraph 87 of the Complaint, Answering Defendants admit that a meeting took place. Answering Defendants deny the remaining allegations in this paragraph.

42. Answering Defendants deny the allegations contained in Paragraphs 88 and 89 of the Complaint.

43. Answering the allegations contained in Paragraph 90 of the Complaint, Answering Defendants deny that the City made unreasonable demands upon plaintiff or that plaintiff is a victim of content-based discrimination. Answering Defendants allege that they are without sufficient information or belief to enable them to answer the remaining allegations of this paragraph and, basing their denial on that ground, deny the remaining allegations therein.

DECLARATORY RELIEF

44. Answering Defendants deny the allegations contained in Paragraphs 91 through 97 of the Complaint.

FIRST COUNT

(Violation of the First Amendment to the United States Constitution)

(Against Defendants the City of Menlo Park and Bertini)

45. Answering the allegations contained in Paragraph 98 of the Complaint, Answering Defendants re-allege and incorporate by reference, as though fully set forth herein, their responses to the allegations set forth in Paragraphs 1 through 97 of the Complaint.

46. Answering the allegations contained in Paragraph 99 of the Complaint, Answering Defendants admit that the First Amendment is applicable to the States and local governments.

47. Answering Defendants deny the allegations contained in Paragraphs 100 through 103 of the Complaint.

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SECOND COUNT

(Violation of the First and Fourteenth Amendments to the United States Constitution)

(Against Defendants the City of Menlo Park and Bertini)

48. Answering the allegations contained in Paragraph 104 of the Complaint, Answering Defendants re-allege and incorporate by reference, as though fully set forth herein, their responses to the allegations set forth in Paragraphs 1 through 103 of the Complaint.

49. Answering the allegations contained in Paragraph 105 of the Complaint, Answering Defendants admit that the First Amendment is applicable to the States and local governments.

50. Answering Defendants deny the allegations contained in Paragraphs 106 through 110 of the Complaint.

THIRD COUNT

(Violation of the First and Second Amendments to the United States Constitution)

(Against Defendants the City of Menlo Park and Bertini)

51. Answering the allegations contained in Paragraph 111 of the Complaint, Answering Defendants re-allege and incorporate by reference, as though fully set forth herein, their responses to the allegations set forth in Paragraphs 1 through 110 of the Complaint.

52. Answering the allegations contained in Paragraph 112 of the Complaint, Answering Defendants admit that the First and Second Amendments are applicable to the States and local governments.

53. Answering Defendants deny the allegations contained in Paragraphs 113 through 121 of the Complaint.

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1 **FOURTH COUNT**

2 **(Violation of 42 U.S.C. §983)**

3 **(Against Defendants the City of Menlo Park and Bertini)**

4 54. Answering the allegations contained in Paragraph 122 of the Complaint, Answering
5 Defendants re-allege and incorporate by reference, as though fully set forth herein, their responses
6 to the allegations set forth in Paragraphs 1 through 121 of the Complaint.

7 55. Answering Defendants deny the allegations contained in Paragraphs 123 through
8 128 of the Complaint.

9 **FIFTH COUNT**

10 **(Violation of the Fourteenth Amendment to the United States Constitution)**

11 **(Against Defendants Becerra and Brown)**

12 56. Answering the allegations contained in Paragraph 129 of the Complaint, Answering
13 Defendants re-allege and incorporate by reference, as though fully set forth herein, their responses
14 to the allegations set forth in Paragraphs 1 through 128 of the Complaint.

15 57. Answering Defendants deny the allegations contained in Paragraphs 130 through
16 133 of the Complaint, Answering Defendants allege that they are without sufficient information or
17 belief to enable them to answer the allegations of these paragraphs, which are being alleged against
18 other defendants and, basing their denial on that ground, deny the allegations therein.

19 **AFFIRMATIVE DEFENSES**

20 **FIRST AFFIRMATIVE DEFENSE**

21 These Answering Defendants allege that the Complaint fails to state a cause of action
22 against these Answering Defendants.

23 **SECOND AFFIRMATIVE DEFENSE**

24 These Answering Defendants deny any wrongdoing, negligence or liability on their part
25 but, should it be determined that these Answering Defendants are liable to Plaintiff, then these
26 Answering Defendants allege that Plaintiff was also legally at fault, and possibly others as well,

1 and thus any recovery that might otherwise be rendered against these Answering Defendants must
 2 be reduced by that percentage which reflects the comparative fault of others.

3 **THIRD AFFIRMATIVE DEFENSE**

4 These Answering Defendants allege that Plaintiff acted with full knowledge of all the facts
 5 and circumstances surrounding his injuries and that said matters of which Plaintiff assumed the risk
 6 proximately contributed to and proximately caused his injuries, if any.

7 **FOURTH AFFIRMATIVE DEFENSE**

8 These Answering Defendants allege their acts were necessary and privileged.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 These Answering Defendants allege that, at all times relevant herein, Answering
 11 Defendants acted reasonably and without malice.

12 **SIXTH AFFIRMATIVE DEFENSE**

13 These Answering Defendants allege that each of the acts alleged to have been committed by
 14 them were committed in good faith and in the exercise of a good faith belief that said acts were
 15 proper and lawful and within their legal responsibility and discretion.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 These Answering Defendants allege that the acts complained of occurred within the scope
 18 of their official duties and said Answering Defendants had no knowledge that said acts were illegal
 19 and/or unconstitutional, nor were said acts clearly violative of the Plaintiff's rights at the time they
 20 were committed.

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 These Answering Defendants allege that Plaintiff was guilty of willful and gross
 23 carelessness, misconduct and negligence in and about the matters set forth in the Complaint, and
 24 that said willful and gross behavior proximately caused and contributed to the happening of the
 25 incident and to the injuries, loss and damages complained of, and Plaintiff's willful and gross
 26 behavior either bars or reduces any potential recovery.

NINTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff, by his own conduct, induced and intentionally caused and brought about the conduct of which Plaintiff complains, and the injuries, loss and damages complained of, and Plaintiff's intentional conduct either bars or reduces any potential recovery.

TENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff consented to the acts complained of in the Complaint and that said consent was both express and implied.

ELEVENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that each and every cause of action against individual defendants alleged in the Complaint is barred by qualified immunity.

TWELFTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that this Complaint is barred by the relevant portions of the California Government Code, including, but not limited to, §§ 815, 815.2, 815.6, 818, 818.2, 818.4, 818.8, 820, 820.2, 820.4, 820.6, 820.8, 820.9, 821, 821.2, 821.6, 821.8, 822.2, 844.6, and 845.

THIRTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants contend that Plaintiff's cause of action is barred by virtue of the doctrine of unclean hands.

FOURTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff has failed to mitigate the alleged damages, if any, which he claims to have sustained, and his recovery, if any, should be barred or diminished accordingly.

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FIFTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants contend that Plaintiff's action is frivolous, unreasonable and without foundation and Answering Defendants are therefore entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and Code of Civil Procedure §§ 1021.7 and 1038.

SIXTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that they are entitled to absolute immunity.

SEVENTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff's cause of action is premature.

EIGHTEENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff has failed to exhaust his administrative remedies before bringing his cause of action against Answering Defendants.

NINETEENTH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff's Complaint is barred, in whole or in part, because Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by Answering Defendants or to avoid harm otherwise.

TWENTIETH AFFIRMATIVE DEFENSE

These Answering Defendants allege that Plaintiff's claim for injunctive or other equitable relief is barred because Plaintiff has an adequate and complete remedy at law.

TWENTY-FIRST AFFIRMATIVE DEFENSE

These Answering Defendants allege that each and every cause of action is barred by virtue of Plaintiff's failure to comply with the requirements of California Code of Civil Procedure §§ 335, et seq., including, but not limited to §§ 335.1, 340, 342 and 343.

TWENTY-SECOND AFFIRMATIVE DEFENSE

These Answering Defendants allege that each and every cause of action is barred by virtue of Plaintiff's failure to comply with the requirements of California Code of Civil Procedure §§ 312, 335, et seq., including, but not limited to §§ 335.1, 338, 340, 342 and 343.

TWENTY-THIRD AFFIRMATIVE DEFENSE

These Answering Defendants allege that each and every cause of action is barred by the applicable Statute of Limitation, including specifically the limitations period set forth in California Code of Civil Procedure §1094.6 which required plaintiff to challenge any City of Menlo Park decision in the appropriate court of competent jurisdiction within ninety (90) days, unless a shorter time is required by State or Federal law; and that if plaintiff believed any City of Menlo Park decision to have involved speech or expressive conduct entitled to protection by the First Amendment, any petition must have been served on the City of Menlo Park no later than twenty-one (21) calendar days following the challenged decision pursuant to California Code of Civil Procedure Section 1094.8.

WHEREFORE, these Answering Defendants pray that Plaintiff take nothing by her Complaint, for costs of suit herein, and for such other and further relief as to the Court may seem reasonable and proper.

Date: March 20, 2018

HOWARD ROME MARTIN & RIDLEY LLP

By: /s/ Todd H. Master

Todd H. Master
Attorneys for Defendants
CITY OF MENLO PARK and
DAVE BERTINI

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1 **NOTICE OF INTENT TO SEEK ATTORNEYS' FEES**

2 TO PLAINTIFF AND TO HIS ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that Answering Defendants contend that Plaintiff's Complaint
4 was not filed nor maintained in good faith or with reasonable cause and that these Answering
5 Defendants are entitled to and intend to seek reasonable attorneys' fees from the Plaintiff and from
6 Plaintiff's attorneys of record, pursuant to Title 42 U.S.C. §1988 and Code of Civil Procedure
7 §§ 1021.7 and 1038.

8 Date: March 20, 2018

HOWARD ROME MARTIN & RIDLEY LLP

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10 By: /s/ Todd H. Master

11 Todd H. Master
12 Attorneys for Defendants
13 CITY OF MENLO PARK and
14 DAVE BERTINI

15 **JURY DEMAND**

16 These Answering Defendants hereby demand a trial by jury in this action.

17 Date: March 20, 2018

HOWARD ROME MARTIN & RIDLEY LLP

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19 By: /s/ Todd H. Master

20 Todd H. Master
21 Attorneys for Defendants
22 CITY OF MENLO PARK and
23 DAVE BERTINI